NO 22164

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Division

MICHAEL J. LIGHTFOOT
Assistant U.S. Attorney

1200 U.S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2434 - 688-2423

Attorneys for Appellee
United States of America

NO. 22164

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Division

MICHAEL J. LIGHTFOOT
Assistant U.S. Attorney

1200 U.S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2434 - 688-2423

Attorneys for Appellee
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 22164

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PROCEEDINGS

On November 10, 1966, the Federal Grand Jury for the Southern District of California, Central Division, returned an indictment in four counts charging the defendant HELEN REYES and one David J. Gonzalez with the sale and concealment of heroin on July 28, 1966, and August 29, 1966 [Case No. 36813 - C.T. 2-5].[1/] On November 10, 1966, the Federal Grand Jury for the Central District of California returned a two-count indictment against the defendant and Gonzalez charging the sale and concealment of heroin on October 13, 1966 [Case No. 57 - C.T. 2-3]. Both defendants

---

1/ C.T. refers to Clerk's Transcript.

plead not guilty to all counts, and Cases 36813 and 57 were consolidated [Case No. 36813 - C. T. 6; Case No. 57 - C. T. 4].

Defendant Helen Reyes was separately tried by a jury before the Honorable Jesse W. Curtis on April 25 and 26, 1966. On the latter date, verdicts of not guilty were returned on the two counts involving the July 28, 1966 transaction [Case No. 36813 - C. T. 32]. Verdicts of guilty were returned on the two counts involving the August 29, 1966 transaction [Case No. 36813 - C. T. 32, 33], and the October 13, 1966, transaction [Case No. 57 - C. T. 14-15].

The defendant's motion for a new trial was denied on June 19, 1967, and the defendant was sentenced to five years imprisonment on each of the four counts, the sentences to run concurrently [Case No. 36813 - CT 35; Case No. 57 - C. T. 17].

Notice of appeal was filed on June 19, 1967 [Case No. 36813 - C. T. 38-39; Case No. 57 - C. T. 19-20].

II

STATUTE INVOLVED

Section 174, Title 21, United States Code, provides in pertinent part as follows:

> "Whoever . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States

contrary to law, . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000 . . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

A. TRANSACTION OF AUGUST 28, 1966.

Agent Sergio Borquez of the Bureau of Narcotics met with an informant, Manuel Martinez, the night of August 28, 1966, relative to a possible narcotics transaction [R. T. 122-23]. 2/ Under the observation of Borquez, Martinez met with co-defendant David Gonzalez at the corner of Crockett and 83rd Streets, Los Angeles [R. T. 123]. Shortly thereafter a 1961 Chevrolet driven by a woman - License No. KIJ 959 - drove up [R. T. 124]. The car belonged to

---

2/ R. T. refers to Reporter's Transcript.

the defendant [R. T. 186]. Martinez then returned to Borquez who gave the informant $120 [R. T. 124]. Martinez gave the money to Gonzalez who in turn handed two rubber condoms to the informant [R. T. 125]. These condoms, it was later determined, contained heroin [R. T. 115].

The jury returned verdicts of not guilty as to the two counts relative to this transaction.

B. TRANSACTION OF AUGUST 29, 1966.

Agent Borquez of the Bureau of Narcotics met with the same informant on August 29, 1966, relative to another possible narcotics transaction [R. T. 127]. He listened in to a telephone conversation between the informant and co-defendant Gonzalez when Gonzalez advised that he would have to be taken to meet with "the woman" [R. T. 128]. Borquez, Gonzalez, and the informant then drove to Ferris Street and Whittier Boulevard [R. T. 129]. Gonzalez got out of the car, made a phone call, returned to the car and asked for money, stating "the woman" was on her way [R. T. 129]. After waiting at the corner of Whittier and Ferris Streets, Los Angeles, for about twenty-five minutes, the defendant drove up in a 1961 Chevrolet - license No. KIJ 959 - and parked [R. T. 124, 130]. The car was registered to the defendant [R. T. 186]. Gonzalez went up to the car and leaned in the window [R. T. 130, 165]. A surveilling agent, Herbert Emrod, saw the defendant hand Gonzalez a small object at this point [R. T. 165].

The defendant left her car and she and Gonzalez entered a drugstore at the corner [R. T. 131, 166]. Surveilling agent Emrod followed the two into the drugstore where he observed Gonzalez hand an object to the defendant [R. T. 166]. Gonzalez then departed the drugstore and proceeded back to the car of Agent Borquez, where he handed Borquez a rubber condom [R. T. 132]. The contents of the condom were analyzed to contain heroin [R. T. 117].

C. TRANSACTION OF OCTOBER 13, 1966.

On October 13, 1966, Agent Borquez again met with David Gonzales and the informant and the three proceeded to Hubbard and McDonnell Streets in East Los Angeles. Gonzalez again asked for money, stating he was going to "the connection's" house [R. T. 134]. Agent Borquez gave Gonzalez $240 in prerecorded bills and Gonzalez then left on foot west on Hubbard Street and then north on McBride Street out of sight of Agent Borquez [R. T. 134]. The three previously mentioned individuals had been under the constant surveillance of Agent Caromb Durel from the time that Borquez and the informant met and proceeded to pick up Gonzales on the afternoon of October 13 [R. T. 177]. After Gonzalez left Borquez's car, Durel observed him proceed north on McBride Street and disappear behind the residence at 662 McBride Street [R. T. 177-178]. Durel observed Gonzalez reappear some twenty minutes later and run back to Agent Borquez's car [R. T. 178]. Durel then joined Borquez where Gonzalez was placed under arrest

and Durel was advised by Borquez that a narcotics transaction had taken place [R.T. 179]. Borquez then observed Gonzalez give Agent Ortiz a plastic bag [R.T. 135]. The contents of the bag were determined to contain heroin [R.T. 120].

Agent Durel then proceeded to the rear of 662 McBride and knocked on the door of 662-1/2 McBride. A man answered and replied to Durel's question that the defendant was in the bedroom. Durel then entered the house and placed the defendant under arrest [R.T. 179]. The defendant subsequently surrendered to Agent Durel $220 from her brassiere which Durel determined to match the serial numbers of the bills previously given to Gonzalez [R.T. 183].

D. MOTION FOR SUPPRESSION OF EVIDENCE.

Agent Caromb Durel of the Federal Bureau of Narcotics, who arrested the defendant on October 13, 1966, testified before trial at a hearing to determine probable cause for arrest as follows:

He had been advised by fellow Narcotics Agents that David Gonzalez engaged in a heroin transaction on July 28, 1966, and that a 1961 Chevrolet - license No. RIJ 959 - had also been involved [R.T. 67-68; 73-74]. He had further been advised that the car in question belonged to the defendant [R.T. 68]. Fellow agents further apprised Durel that Gonzalez engaged in a hand-to-hand heroin transaction with a woman on August 29, 1966, and that the same 1961 Chevrolet had been used [R.T. 68; 71-72; 75]. Narcotics

Agent Herbert Emrod had shown Durel a photograph of the defendant and identified her as the woman who participated in the August 29 transaction [R. T. 71].

On October 13, 1966, Durel observed Gonzalez leave a vehicle containing an Agent and an informant and then disappear behind the residence at 662 McBride Street [R. T. 69]. Durel observed the 1961 Chevrolet involved in the previous transactions parked in the driveway at that address [R. T. 69].

Gonzalez reappeared in about twenty minutes and was arrested by Agent Sergio Borquez [R. T. 69]. After he approached Borquez's vehicle, Durel was informed that recorded money previously given to Gonzalez was gone and that what appeared to be narcotics had been taken from him [R. T. 69-70]. Durel then went to the rear of 662 McBride and knocked on the door of the residence at 662-1/2 McBride [R. T. 70, 84]. He asked a man who opened the door if Helen Reyes was there. The man replied that she was [R. T. 70]. Durel thereupon entered the house and placed the defendant under arrest [R. T. 70]. Upon Durel's request, the defendant removed some bills from her brassiere and handed them to him. Durel compared these bills with a previously recorded list of serial numbers and they matched [R. T. 72].

QUESTIONS PRESENTED

A. WHETHER THE FAILURE TO RECORD THE GRAND JURY TESTIMONY VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

B. WHETHER THE INDICTMENT WAS INVALID ON THE BASIS OF SPECULATION THAT INADEQUATE EVIDENCE WAS PRESENTED TO THE GRAND JURY.

C. WHETHER THE ARREST AND SUBSEQUENT SEARCH OF THE DEFENDANT WERE PROPER.

D. WHETHER THE ADMISSION OF HEARSAY TESTIMONY ADMISSIBLE UNDER THE RULES OF EVIDENCE DENIED THE DEFENDANT A FAIR TRIAL.

E. WHETHER THE PRESUMPTION OF KNOWLEDGE OF ILLEGAL IMPORTATION CONTAINED IN 21 U.S.C., §174 IS CONSTITUTIONAL.

F. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT OF GUILTY.

V

ARGUMENT

A. FAILURE TO RECORD THE GRAND JURY TESTIMONY DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

The grand jury testimony was not transcribed [R. T. 64.] The following language in Loux v. United States, 389 F. 2d 911 (9th Cir. 1968) (cert. denied 393 U. S. 867) is dispositive of the defendant's first contention that the lack of such a transcript violated her constitutional rights:

> "The law does not require that the testimony of witnesses before a grand jury be recorded or transcribed. Rule 6(d), F. R. Crim. P is permissive, not mandatory. Every court that has considered the question has so held. United States v. Caruso, 2 Cir., 1966, 358 F. 2d 184, 186; United States v. Cianchetti, 2 Cir., 1963, 315 F. 2d 584, 591; United States v. Martel, D. C. N. Y., 1954, 17 F. R. D. 326 (cited with approval in Cianchetti, supra); United States v. Hensley, 6 Cir. 1967, 374 F. 2d 341, 352; Welch v. United States, 10 Cir., 1966, 371 F. 2d 287, 291. Nor is there support for the claim that failure to record grand jury testimony violates the defendants' constitutional rights. United States v. Cianchetti,

supra, and United States v. Hensley, supra, are to the contrary. See also Lawn v. United States, 1958, 355 U.S. 339, 349-350, 78 S.Ct. 311, 2 L.Ed.2d 321; Costello v. United States, 1956, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397."

389 F.2d at 916.

See also Jack v. United States, 9th Cir. No. 23171, decided March 25, 1969.

B. THE GRAND JURY INDICTMENT WAS VALID.

The defendant, for the first time on appeal, contends that the indictment was invalid. Her contention is based on speculation that no evidence of the illegal importation of the heroin in question was presented to the grand jury.

The defendant is foreclosed from attacking the indictment on appeal since she failed to move in the trial court for a dismissal of the indictment. Rule 12(b)(2), Federal Rules of Criminal Procedure; United States v. Messina, 388 F.2d 393, 394 (2nd Cir. 1968).

Unsupported suspicions of what evidence might have been used by a grand jury will not vitiate an indictment. Huerta v. United States, 322 F.2d 1, 2 (9th Cir. 1963), cert. denied 376 U.S. 954. Moreover, the legal presumption in §174, Title 21, United States Code, to the effect that possession of heroin by the

defendant is sufficient evidence at trial of knowledge of the illegal importation of the drug renders such a presumption, a fortiori, more than sufficient to support the return of an indictment by a grand jury. See United States v. Adams, 293 F. Supp. 776, 787 (S. D. N. Y. 1968). Additionally, it is well-settled that an indictment cannot be invalidated on the basis that inadequate or incompetent evidence was presented to the grand jury. Lawn v. United States, 355 U. S. 339, 349 (1958); Costello v. United States, 350 U. S. 359, 360 (1955); Wood v. United States, 405 F. 2d 423, 425 (9th Cir. 1969); Johnson v. United States, 404 F. 2d 1069, 1070 (9th Cir. 1969).

C. THE WARRANTLESS ARREST OF THE DEFENDANT WAS BASED ON REASONABLE GROUNDS AND WAS THEREFORE PROPER; THE SUBSEQUENT SEARCH AND SEIZURE WAS PROPER AS IT WAS INCIDENTAL TO THE ARREST.

The authority of Agent Durel to effect the arrest of the defendant must be determined by federal law. Miller v. United States, 357 U. S. 301, 305 (1958). Section 7607(2) of Title 26, United States Code, defines the authority of Bureau of Narcotics agents to make warrantless arrests. That section provides:

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as

amended; 19 U.S.C., sec. 1401(1)), may --

* * *

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

"Reasonable grounds" as used in that section is substantially equivalent to "probable cause" as that term is used in the Fourth Amendment to the United States Constitution. Draper v. United States, 358 U.S. 307 (1959); Redmon v. United States, 355 F. 2d 407 (9th Cir. 1966). It is the Government's contention that Agent Durel had ample "reasonable grounds" to believe the defendant had violated the narcotics laws on July 28, 1966, August 29, 1966, and October 13, 1966 when he arrested her on the latter date.

The following is a summary of the information in the possession of Agent Durel at the time of his arrest of the defendant on October 13, 1966:

a) He had been advised by fellow Bureau of Narcotics agents that they had observed David Gonzalez (the defendant's co-indictee) in a heroin transaction on July 28, 1966, and that a

1961 Chevrolet - license KIJ 959 - was involved in the transaction [R.T. 68, 73-74].

b) Agent Durel had been further advised by fellow agent Herbert Emrod that Gonzalez had engaged in a hand-to-hand heroin transaction with a woman on August 29, 1966, and that the same vehicle mentioned in (a) had been used during that transaction [R.T. 68, 71-72, 75].

c) Agent Durel had been shown a photograph of the defendant by Agent Emrod who advised that she was the woman who engaged in the hand-to-hand transaction with Gonzales on August 29, 1966 [R.T. 71].

d) Durel had knowledge that the objects involved in both the July 28 and August 29 transactions had been analyzed by the U.S. Chemist as heroin [R.T. 76].

e) Durel had knowledge that the car involved in both the July 28 and August 29 transactions was registered to the defendant [R.T. 68].

f) Durel had observed Gonzalez on October 13, 1966, leave the vehicle containing Agent Borquez and an informant and disappear behind the residence at 622 McBride Street. He further observed Gonzalez reappear in twenty minutes, subsequent to which he approached the car containing the agent where he was advised that recorded money previously given to Gonzalez was gone and that what appeared to be narcotics had been taken from Gonzalez [R.T. 69, 70].

g) On October 13, Agent Durel had observed the

automobile (1961 Chevrolet - license number KIJ 959) involved in the July and August transactions parked in the driveway of 662 McBride Street [R.T. 69].

h) Agent Durel, on October 13, asked a woman at one of the two residences in back of 662 McBride Street what her name was. He then knocked on the door of the other residence (662-1/2 McBride) in back of 662 McBride. He asked a man who opened the door if the defendant was there; he was advised she was in the bedroom. Durel thereafter entered the house and effected the defendant's arrest [R.T. 70, 84].

> "Probable cause to arrest the defendant existed if the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information prior to the arrest were sufficient in themselves to warrant a man of reasonable caution in believing that an offense had been or is being committed by such a person."
>
> United States v. Cleaver, 402 F.2d 148, 151 (9th Cir. 1968), citing Brinegar v. United States, 338 U.S. 160 (1948).

It can hardly be argued that the facts and circumstances within the knowledge of Agent Durel were not sufficient under the test just cited. He had information from fellow agents who had observed two previous transactions involving co-defendant Gonzalez

that her car had been used in the first transaction and that she had engaged in a hand-to-hand heroin transaction on the second occasion. Moreover, on October 13, 1966, this previous information was corroborated by Durel's observation of the defendant's car in close proximity to the residence in which she was arrested, by his observation of Gonzalez disappearing into an alley leading to the defendant's residence, by his being advised that Gonzalez had just bought heroin, and by the statement of the man who answered the door at 662-1/2 McBride Street that the defendant was inside.

Mangaser v. United States, 335 F. 2d 971 (9th Cir. 1964), the only decision relied on by the defendant, is distinguishable in that there the facts disclosed only the possibility that the defendants had engaged in a narcotics transaction in the context of a situation where the arresting officers had no information that the appellants had ever before been involved in narcotics violations. Here, to the contrary, Agent Durel had abundant information of the prior involvement of the defendant in narcotics transactions, which information when tied together with the corroborating evidence he personally gathered on October 13 in the vicinity of the defendant's residence surely would warrant a man of reasonable caution to believe the defendant had committed a felony. All information in the agent's possession, fair inferences therefrom, and observations made by him are pertinent. Ng Pui Yu v. United States, 352 F. 2d 626, 631 (9th Cir. 1965).

The subsequent search and seizure of the defendant, resulting in the recovery of recorded government funds, was

consequently valid as it was incidental to the valid arrest of the defendant. United States v. Rabinowitz, 339 U.S. 56, 60 (1950); Cotton v. United States, 371 F.2d 385, 393-94 (9th Cir. 1967).

As a final consideration touching on the arrest and subsequent search on October 13, 1966, the defendant questions the entry of Agent Durel into her residence. She relies on Sabbath v. United States, 391 U.S. 585 (1958).

This same question was considered by the Ninth Circuit in Ng Pui Yu v. United States, supra. There federal narcotics officers entered the apartment dwelling of the defendant through an open door without stating their authority or purpose.[3/] The court held that the officers' entry through the open door did not invalidate the subsequent arrest, reasoning that no "breaking" could occur by reason of passage through an open door and that consent to enter was not required. Ng Pui Yu v. United States, supra, at 632. This rationale was earlier approved by the Supreme Court in Miller v. United States, 357 U.S. 301 (1957), at 308, where the court, in discussing the meaning of "breaking", referred to the common law requirement for burglary that the breaking must entail some physical force.

In Sabbath, relied on by the defendant, the issue was whether the petitioner's arrest was invalid because federal officers opened the closed but unlocked door of petitioner's apartment and entered in order to arrest him without first announcing their identity and

---

3/ An announcement of purpose and authority is required before federal officers may break into a residence. Section 3109, Title 18, United States Code.

purpose. The facts in Sabbath are essentially different because there the door through which entry was made was not open. But the court did discuss the question of what constituted a breaking by stating again, as it had in Miller, that the common law burglary elements applied and that some physical force was necessary to result in a breaking. Sabbath v. United States, supra, at 833 and 834.

Since Agent Durel did not use any physical force to effect his entry into the defendant's residence, but simply walked through an open door, his entry was legal and the subsequent arrest and search were valid [R.T. 70].

D. AGENT BORQUEZ'S TESTIMONY CONCERNING STATEMENTS OF THE INFORMANT AND THE CO-DEFENDANT WERE PROPERLY ADMITTED INTO EVIDENCE.

During the testimony of Narcotics Agent Sergio Borquez, he testified once as to a statement made to him by an informant and at other times to statements made by co-defendant Gonzalez. First, Borquez testified as follows regarding the July 28th transaction:

> "The information [sic], Manuel Martinez, he came back to where I was waiting at the corner and he made me aware that we were to come back in about a half hour because the woman had not arrived with the heroin that we were to get. So we waited there in the truck." [R.T. 123, lines 10-14.]

Then, with regard to the August 29 transaction, Borquez testified as follows:

> "Well, the same agents again met with the informant at Florence and Alameda where we usually met, and on this occasion the informant telephoned No. 587-1781, and with his permission I listened on a twin phone to this conversation. He asked for Froggy and Froggy answered 'Yes, this is Froggy.' Then he asked Froggy if he could score some heroin
>
> . . .
>
> "If he could purchase some heroin, and Froggy told him -- Mr. David Gonzalez told him that he would have to come up and pick him up and take him over to meet with the woman."
>
> [R.T. 127, lines 20-25; 128, lines 1, 7-10.]

On three subsequent occasions, Agent Borquez testified to statements of co-defendant Gonzalez. ["the woman was on her way," R.T. 129, line 21; again that "she was on her way," R.T. 130, line 8; and finally that "the woman did not trust him and that he [Gonzalez] had to have the money first," R.T. 134, lines 10-11]. The first two statements related to the August 29, 1966 transaction and the third to the October 13, 1966 transaction. The defendant objected to the first two statements of Agent Borquez on the basis of hearsay. His objections were overruled [R.T. 123, lines 15-16;

R.T. 128, lines 11-12]. She failed to object to Agent Borquez's remaining statements. The defendant now urges that the admission of these statements denied her a fair trial because of their hearsay nature and because they denied her the right of confrontation of witnesses.

The defendant cannot now attack the admissibility of evidence to which she failed to object at trial. Montgomery v. United States, 9th Cir., No. 22461, decided February 28, 1969; United States v. Della Rocca, 388 F.2d 525, 527 (2d Cir. 1968). To the first two of Agent Borquez's statements to which she objected on the basis of hearsay, the trial court properly ruled that they were admissible:

> "It is not to be considered by the jury as any evidence of the fact itself, just merely explains why he [the informant] waited and the sequence of events."
>
> [R.T. 123, lines 22-25].
>
> ". . . this is not competent evidence of the fact, if it is a fact, that his source was a woman. But, it is only evidence which will permit you to follow the sequence of events . . . You should not consider them as proof of the fact that his [co-defendant Gonzalez] source was a woman."
>
> [R.T. 128, lines 18-25].

Such statements were admissible as relating to the subsequent conduct of Agent Borquez. McCormick, Evidence

(1954), pp. 464-465; United States v. Annunziato, 293 F. 2d 373, 377 (2d Cir. 1961), cert. denied 368 U.S. 919.

Except for the first statement of Agent Borquez concerning what the informant had told him, the remaining statements related to what co-defendant Gonzalez had told the agent. These remaining statements were admissible against the defendant as independent evidence of a concert of action between the accomplice and the defendant. For this purpose, the evidence need not show a criminal conspiracy. Williams v. United States, 289 F. 2d 598, 601 (9th Cir. 1961). In order that such statements be deemed admissible, it is not necessary that the indictment allege that there was a conspiracy. Enriquez v. United States, 338 F. 2d 165, 167-168 (9th Cir. 1964); Ortiz v. United States, 318 F. 2d 450, 451-452 (9th Cir. 1963).

The admissibility of the statements in question remain unaffected by the recent decisions of the Supreme Court relating to the right of defendants to the confrontation of witnesses. Bruton v. United States, 391 U.S. 123 (1967); Barber v. Page, 390 U.S. 719 (1967); Douglas v. Alabama, 380 U.S. 415 (1964); Pointer v. Texas, 380 U.S. 400 (1964). Both the Barber and Douglas decisions, ruling hearsay testimony inadmissible where that testimony was not subject to cross-examination, specifically allude to the fact that the hearsay testimony was inadmissible under traditional rules of evidence. Barber v. Page, supra, at 723; Douglas v. Alabama, supra, at 418. Here, as has been pointed out, the questioned testimony was admissible under the

rules of evidence. In Bruton, supra, at 128, footnote 3, the court states:

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, see Krulewitch v. United States, 336 U.S. 440; Fiswick v. United States, 329 U.S. 211, the problem arising only because the statement was (but for the violation of Westover, supra, n. 1) admissible against the declarant Evans. See C. McCormick, Evidence §239 (1954); 4 J. Wigmore, Evidence §§1048-1049 (3d ed. 1940); Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L.J. 355 (1921). See generally Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954); Note, Post-Conspiracy Admissions in Joint Prosecutions, 24 U. Chi. L. Rev. 710 (1957); Note, Criminal Conspiracy, 72 Harv. L. Rev. 920, 984-990 (1959). There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause. See Pointer v. Texas, 380 U.S. 400; Barber v. Page, 390 U.S. 719; Mattox v. United States,

156 U.S. 237. See generally McCormick, supra, §224; 5 Wigmore, supra, §§1362-1365, 1397; Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948)."

The defendant cites Doty v. United States, 3 Cr. L. 2220 (10th Cir. 1968), for the proposition that the contents of a telephone conversation between an informant and co-defendant are not admissible without the consent of both parties to the call. The court held in Doty, rather, that the introduction of a tape recording of a conversation between an informant and the defendant was improper because no prior approval by judge or magistrate was sought or obtained. However, it is the law of this Circuit Court of Appeals that such a tape recording is admissible upon the consent of one of the parties. Jack v. United States, 387 F.2d 471, 472 (9th Cir. 1967); Garrett v. United States, 382 F.2d 768, 771 (9th Cir. 1967).

The facts in this case are essentially different. No tape recording was admitted into evidence. Agent Borquez simply testified to a telephone conversation between Gonzalez and the informant that he overheard with the consent of the informant [R.T. 127]. It is well established that such testimony is admissible. Rathbun v. United States, 355 U.S. 107, 110 (1957); United States v. Caci, 401 F.2d 664, 670-71 (2d Cir. 1968).

E. THE COURT PROPERLY INSTRUCTED THE JURY ON THE PRESUMPTION CONTAINED IN SECTION 174 OF TITLE 21, UNITED STATES CODE.

The court instructed the jury, in line with the language of §174 of Title 21, United States Code, that:

> " . . . This statute [Section 174] also provides that whenever on trial for a violation of this statute the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." [R.T. p. 236].

The defendant attacks this instruction on two grounds: (1) the statutory presumption is unconstitutional, and (2) the defendant was not shown to have had possession of the heroin, to permit the statutory presumption. As authority for the first ground, the defendant cites United States v. Adams, 293 F. Supp. 776 (S.D.N.Y. 1968). Without conceding the correctness of the Adams decision, that case is clearly distinguishable for it deals with the statutory presumption of illegal importation of marihuana under §176(a) of Title 21, United States Code. The court's opinion was primarily based on a finding that marihuana, unlike heroin, was grown in considerable quantity in this country. Moreover, it has

been consistently held that the statutory presumption dealing with heroin in §174 is constitutionally valid. Yee Hem v. United States, 268 U.S. 178, 184 (1925); Jones v. United States, 400 F.2d 134, 136 (9th Cir. 1968); Ramirez v. United States, 350 F.2d 306 (9th Cir. 1965).

The defendant's second ground, that the defendant did not have possession of the heroin, overlooks the instruction on possession given by the court:

> "The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who although not in actual possession knowingly has the power and intention at a given time to exercise the dominion and control over a thing either directly or through another person or persons is then in constructive possession of it." [R.T. 237, lines 9-17].

Clearly the jury could have found that the defendant, if not in actual possession, had constructive possession of the narcotics. In fact, she was observed to hand a package to Gonzalez on August 29, 1966, later determined to contain heroin, thereby indicating actual possession. As to the October 13, 1966, transaction, Gonzalez appeared from the area of her residence with a package of heroin and the defendant was later found in the possession of the

money given previously to Gonzalez to purchase the narcotics. From this, the jury could reasonably have determined that she was in constructive possession of the heroin.

F. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE GUILTY VERDICT.

The defendant failed to move for a judgment of acquittal at the close of all the evidence [R. T. 190]. She is therefore foreclosed on appeal from attacking the sufficiency of the evidence unless review would be necessary to prevent a manifest miscarriage of justice. Rule 29, Federal Rules of Criminal Procedure; Beckett v. United States, 379 F. 2d 863, 864 (9th Cir. 1967).

Clearly the record here convincingly establishes the guilt of the defendant as to the transactions of August 29, 1966 and October 13, 1966. She was observed on the former date to hand a package to David Gonzalez which was later determined to contain heroin and, as to the latter date, Gonzalez was observed to disappear into the area of her residence and return with a package of heroin. She was later found to be in the possession of the money that was earlier given to Gonzalez by narcotics agents.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

MICHAEL J. LIGHTFOOT
Assistant U. S. Attorney

Attorneys for Appellee
United States of America